34

Office - Supreme Court, U. S.
FILED
APR 19 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 1141

JAMES R. HILL, A MINOR, BY THEODORE A. HILL, HIS FATHER AND NEXT FRIEND,

Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

ROYAL W. IRWIN,
Attorney for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Petition for writ of certiorari	1-5
Statement of matters involved	1
Basis of jurisdiction	3
Questions presented	3
Reasons for allowance of writ	5
Prayer	5
Brief in support of petition	7

Cases Cited.

Bailey v. Central Vermont R. R. Co., 319 U. S. 350	16
Bremer v. L. E. & W. R. R. Co., 318 Ill. 11	10
Bermier v. I. C. R. R. Co., 296 Ill. 464	8
C. B. & Q. R. R. Co. v. Murowski, 179 Ill. 77	9
C. & A. R. R. Co. v. O'Neil, 172 Ill. 527	9
Gibson v. Leonard, 143 Ill. 182	14
Hughes v. Medendorf, 294 Ill. App. 424	16
I. C. R. R. Co. v. O'Connor, 189 Ill. 559	8
McDaniel v. Terminal R. R. Co., 302 Ill. App. 332	14
Moore v. Ohio Oil Co., R. R. Co., 241 Ill. App. 388	15
Pittsburgh & Ft. W. & C. R. R. Co. v. Callaghan, 157 Ill. 406	9
Ryan v. C. & N. W. R. R. Co., 315 Ill. App. 65	15

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. .....

JAMES R. HILL, A MINOR, BY THEODORE A. HILL, HIS FATHER AND NEXT FRIEND,

Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The petition of James R. Hill, a minor by Theodore A. Hill, his father and next Friend, respectfully shows:

(1) Statement of the Matter Involved.

The petitioner (plaintiff below) brought an action against the respondent (defendant below) for damages in the United States District Court for the Northern District of Illinois, Eastern Division.

The Complaint alleged that the respondent, a railroad

company, had a right of way in which it caused locomotives and cars to be moved over certain tracks adjacent to the Allied Mills, Inc. in Christian County, Illinois; that on the premises of the Allied Mills, Inc. and close to the right of way of the railroad company was a certain gateway and leading from said gateway was a flight of stairs and that for a long time prior to the accident, people frequently passed over the premises of the Allied Mills, Inc. through said gateway and over said stairs onto and across the right of way of the respondent railroad company adjacent to said premises.

It was further alleged that the petitioner, 11 years of age, had, prior to said occurrence for a long time proceeded through the premises of the Allied Mills, Inc. to and across the right of way of the respondent, of all of which in the exercise of ordinary care on its behalf, the respondent would have notice; that petitioner on the day of the accident proceeded across the tracks of the respondent and when he was between two standing box cars, the respondent caused one of said box cars to be moved against the other and thereby petitioner was crushed between the couplers. The negligence charged was: (a) Respondent negligently caused, permitted and allowed said box car to violently strike against the petitioner; (b) Respondent wilfully and wantonly caused, permitted and allowed said box car to violently strike against the petitioner; (c) Respondent negligently failed to keep a proper lookout for persons crossing said tracks; (d) Respondent negligently failed to give suitable, sufficient and proper notice, signal and warning that the box car was about to be moved.

Respondent's answer did not deny that it caused one of said box cars to be moved against the other box car, thereby crushing the petitioner between the couplers, but it did deny that it was guilty of any of the negligence charged against it. (Tr. 5.)

There was much evidence that for at least six months prior to the accident, the petitioner and a considerable number of the public passed through the property of the Allied Mills, Inc. and over the rails of the respondent at the place where the accident occurred.

The trial court directed a verdict for the respondent without indicating the ground upon which it acted. (Tr. 61.)

From this judgment, petitioner appealed to the Circuit Court of Appeals for the 7th Circuit. The Circuit Court of Appeals affirmed the District Court on the ground that in the situation here appearing, it did not believe the respondent could have been expected to anticipate the petitioner's presence on the tracks between the cars, and that there was not sufficient evidence of a wilful and wanton injury to make a jury issue. (Tr. 86.)

(2) Basis of Jurisdiction of This Court.

(a) Federal jurisdiction is based upon the diversity of citizenship between the petitioner and the respondent.

(b) The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 30, 1946 and reported in 153 Fed. (2) 91.

(3) Questions Presented.

The judgment of the Circuit Court of Appeals sought to be reviewed affirmed a judgment of the District Court holding that the petitioner had not made out a prima facie case sufficient to go to the jury.

The Complaint charged respondent with wilful and wanton conduct and with negligence.

The Courts of Illinois hold that where a railroad company permits the public to use portions of its right of way

as a passageway, it must exercise some care to avoid injuring those whom it has reason to know may be upon its premises in the exercise of such privilege, and if there is any evidence in the record fairly tending to show such a gross want of care as indicates a wilful disregard of consequences, or a willingness to inflict injury, then it is a question to be determined by the jury whether the negligent conduct amounted to wantonness and wilfulness.

The Circuit Court of Appeals held to a rule long discarded by the Courts of Illinois that a railroad company is under no duty to exercise active vigilance to provide against injury to a trespasser on its tracks unless his presence is known. (Tr. 84.)

The rule is also firmly established as the law of Illinois that when a railroad company has knowingly permitted licensees to use a well-defined path or roadway across its premises for some considerable time, it should not by any affirmative act on its part injure such licensee.

The Circuit Court of Appeals in avoiding the application of those principles to this case said: "In the situation here appearing, we do not believe the defendant could have been expected to anticipate the plaintiff's presence on the tracks between the cars." (Tr. 86.)

Inasmuch as the Circuit Court of Appeals earlier in its opinion stated: "It is undisputed that for at least six months prior to the accident, persons passed both ways through the property of the Allied Mills and over the defendant's rail (Tr. 83), it seems inconsistent to say that there is no evidence from which the respondent could have been expected to anticipate the petitioner's presence on the tracks. (Tr. 86.)

(4) Reasons for the Allowance of the Writ.

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

The rule in Illinois is now clearly established that the fact of general use by the public of a way so as to create a probability of their presence might make an act which would otherwise be merely negligent so reckless as to indicate a disregard for life or a general disposition to do injury.

The rule is also established in Illinois that it is the duty of a railroad company to refrain from active negligence which may result in injury to a licensee whom the railroad company, has reason to believe is upon the premises.

It is submitted that these reasons call for the exercise of this Court's power of review.

Wherefore, the petitioner respectfully prays: That a Writ of Certiorari be issued out of and under the seal of this Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this Court for its review and determination on a day certain named therein a complete transcript of the record in the case numbered and entitled on its docket as No. 8880, James R. Hill, a minor, by Theodore A. Hill, his Father and Next Friend, Plaintiff-Appellant *vs.* Baltimore & Ohio Railroad Company, a corporation, Defendant-Appellee; that the judgment of the Circuit Court of Appeals may be reversed by this Court; and that your petitioner may have such other and further relief as seems just.

JAMES R. HILL, a minor by Theodore A. Hill, his Father and Next Friend,
Petitioner,

By ROYAL W. IRWIN,
Attorney for Petitioner.